

91-1098

Supreme Court, U.S.

FILED

DEC 18 1991

OFFICE OF THE CLERK

NO.

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1991

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WARENE D. ALFORD, Petitioner,

v.

UNITED STATES GOVERNMENT,  
RESPONDENT.

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PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

---

WARENE D. ALFORD  
Petitioner, Pro Se  
2002 Cedar Valley Ln.  
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(214) 339-9444 Home  
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QUESTIONS PRESENTED  
FOR REVIEW

1. Whether the involuntary reassignment "outside" the ramification of the cognizable Settlement Agreement to a dead-end position that has added "little" to Petitioner's present skills and curtailed Petitioner's career enhancing opportunities, bridging the "career ladder", to a professional occupation, specifically, Contract Specialist, constituted a "breach of the agreement.

2. Whether the Petitioner is entitled "restoration" of her original grade, GS-07, subsequent the "breach" of Agreement, and whether the Petitioner is entitled retroactive pay, promotions, and benefits.

3. Whether the U.S. Court of Appeals erred when it dismissed the Petitioner's claims for "entitlements" subsequent the "Management Initiated-adverse actions-for cause", against the Petitioner, through "no fault" of the Petitioner, depriving the Petitioner her "entitlements" required by law and regulation.

4. Whether the Agency's procedures in arriving at such decisions demonstrated harmful error; and unconstitutional, in that the decisions were not in accordance with law.

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1991

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WARENE D. ALFORD, Petitioner  
v.  
UNITED STATES GOVERNMENT  
Respondent.

---

PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

OPINIONS BELOW

The Opinion and ORDER of the United States Court of Appeals for the Federal Circuit is not citable as precedent pursuant to Fed. Cir. R. 47.8, but is a public record and is reproduced herein as Appendix A.

The Judgment without an Opinion can be found in Appendix B.

The Claims Court's ORDER, Opinion, is part of Appendix C; and Excerpts from the Northern District of Texas, Bench Ruling, can be found in Appendix D.

Excerpts from the Office of Special Counsel, Equal Employment Opportunity Commission, the Merit Systems Protection Board, and the Office of Personnel

Management; in Appendixes E, F, G, and H respectively.

### Jurisdiction

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C.S. 1254(1) and 2350(a).

The Petitioner's Petition for a Rehearing was denied November 4, 1991.

The Petitioner's Petition for a Writ Of Certiorari is before this Honorable Court asking to reinstate the Petitioner's Claims complaint pursuant to 42 U.S.C.S. 1981, as amended; (The Civil Service Reform Act of 1978) 5 U.S.C.S. 7703(c); 28 U.S.C.S. 1491 and U.S. Constitutional Amendment Five, seeking compensation for the "Management Initiated-adverse actions-for cause", against Petitioner, through "no fault" of the Petitioner, which resulted in the Respondent agency, U.S. Army, Corps of Engineers, application of its procedures in arriving at such decisions demonstrated harmful error against the Petitioner, and was not in accordance with law.

The Petitioner's original claims complaint was initially filed September 14, 1990, under 28 U.S.C.S. 1491, in accordance with 2501 and U.S. Constitutional Amendments Five and 14.

Subsequent the Respondent agency's "adverse actions", with respect to compensation, conditions, terms, practices and privileges in federal employment, the Petitioner has been deprived "restoration" of her original grade GS-07, and consequently, the Petitioner's career enhancing opportunities have been curtailed; blocking the Petitioner's opportunity to bridge the "career ladder" to a professional occupation, specifically, Contract Specialist".

The Petitioner has been branded with a stigma, that has caused the Petitioner personal injury, and she has suffered a gross "miscarriage of justice", denied due process for a breached agreement.

The Petitioner believes the U.S. Court of Appeals Federal Circuit, was wrong in its Judgment without an Opinion and affirmed the dismissal of the Petitioner's Claims complaint which was filed for "compensation and restoration" of the Petitioner's original grade GS-07, plus any equitable benefits the Court deemed just and proper; subsequent Respondent's "breach" of the cognizable "Settlement Agreement" (Hanson v. Dept of the Army, 90-3327, October 4, 1990).



The Petitioner's inability to make adequate financial arrangements for competent Counsel representation and the Petitioner's lack of knowledge in the science of law, should not be grounds to dismiss the Petitioner's claims complaint; nor has the Petitioner waived her rights to the appointment of counsel.

The Petitioner believes just as the appointment of counsel for an indigent criminal defendant is a "fundmental right", essential to a fair trial", guarenteed by the Sixth Amendment in Federal Court, for the same reason, though not always in precisely the same terminology, the Fifth Amendment commands that private property or liberty shall not be taken without just compensation (Gideon v. Wainwright et al., 335 U.S. 372, 1963); as in the case of the Petitioner.

For the aforementioned reasons, the Petitioner respectfully request this Honorable Court, grant her Petition for a Writ of Certiorari.

STATUES, CONSTITUTIONAL PROVISIONS, REG'S.

5 U.S.C.S. 7703(c), a part of P.L. 95-454 (The Civil Service Reform Act of 1978), provided in pertinent part:

"In any case filed in the United States

Court of Claims or United States Court of Appeals, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be-

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed: or

(3) unsupported by substantial evidence".

42 U.S.C. Section 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, and licenses, and exactions of every kind, and to no other.

28 U.S.C.S. 1491(a)(1) and (2) provides in part:

(1) The United States Claims Court shall have jurisdiction to render Judgment upon

any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated damages in cases not sounding in tort.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued by any appropriate official of the United States.

5 U.S.C.S. 7513(a) and (d) provides:

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under Section 7701 of this title.

5 U.S.C.S. 5362(a)(2) provides in part:

(a) Any employee-

(2) who has served for 52 consecutive weeks or more in one or more positions.. at a grade or grades higher than that of the new position immediately before such placement be considered to be the retained grade of the employee in any position he holds for the 2 year period beginning on the date of such placement.

5 U.S.C.S. 5366(a)(1) provides:

(a)(1) In case of the termination of any benefits available to an employee... on the grounds such employee declined a reasonable offer of a position the grade or pay of which was equal to or greater than his retained grade and pay, such termination may be appealed to the Office of Personnel Management under procedures prescribed by the Office.

5 U.S.C.S. 2302(b)(11) provides:

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority;

(11) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or

directly concerning, the merit system principles contained in section 2301 of this title.

The Fifth Amendment to the Constitution of the United States provides in part:

No person shall be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation.

5 U.S.C.S. 7701(c)(2)(A)(B) and (C) states in part:

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment-

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in Sec. 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

#### STATEMENT OF THE CASE

The gravamen of the Petitioner's Claims complaint are: 1). Breach of a Cognizable Settlement Agreement and 2). the Respondent's failure to restore the Petitioner to her original grade GS-07 subsequent the breached agreement: (attachment 8, claims complaint).

The Petitioner's "career enhancing" opportunities were completely curtailed by an involuntary reassignment outside the ramification of the cognizable agreement, from a position with "contract related", administrative duties, (see petitioner's claims complaint; attachments 8, 10, 13, 14, 19, 20, and the respondent's 26 Nov. 1984 letter, page 11-cop.) to a position with drafting related, technical duties; depriving the Petitioner the opportunity to continue gain hands-on-experience, to bridge the career ladder to a professional occupation, specifically, Contract Specialist.

Thus, the Petitioner has suffered and continues to suffer personal injury subsequent "adverse actions" against the Petitioner, through "no fault" of the Petitioner, that has adversely affected the Petitioner who has been denied "due process" within the meaning of a relevant statute, and should be entitled judicial review thereof (see claims comp., page 10 thru 18).

The Petitioner contends the newly established position #674, Respondent offered and Petitioner accepted in "good faith" as compensation, to rectify past disparate treatment by the Respondent

agency, never existed in that the newly established position #674, established December 18, 1982, (attachment 10, claims complaint) was amended December 3, 1983; (see attachment 14, claims complaint) consequently, reclassified and downgraded to a GS-1106 Procurement Clerk GS-05, September 28, 1984, position number 1026. (See attach 19, claims complaint) An action the Petitioner believes to be a prohibited personnel practice, and a violation of merit principles, under 5 U.S.C.S 2301 and 2302(b)(11).

It has been established by the investigating agency USACARA, Dallas; (see petitioner's claims complaint page 10) investigator's 1985 investigation report (see respondent's appendix p. 13, para. c; Motion To Dismiss) which states:

"Evidence supports the complainant's contention that job #674 was inaccurately described long before the position survey and somewhat before the reorganization. There is a clear sense in the record that this job was not functioning as an Engineering Technician as far back as when the complainant selected it as the position of her choice. In that context, she was technically misassigned during the entire period. Since she continued to be paid at the GS-06 rate and to receive qualifying experience credit in the engineering technician occupation, she benefited rather than suffered from the missassignment".

The Petitioner disagrees with the USACARA Investigator's theory "Petitioner benefited", in that Petitioner was already qualified at the GS-07 grade level (see attachment 6-4.a., claims comp.) Thus, Petitioner's acceptance of position #674, was for "career enhancement", in an area of the Petitioner's choice. However, Petitioner lost position #674 she agreed to accept; was deprived "restoration" of her original grade GS-07, and involuntarily reassigned a position that has added "little" to Petitioner's present skills; and nine years later, Petitioner remains locked in a position the Petitioner does not want and never agreed to accept; a GS-06, with experience "noncompetitive" for any "career enhancing" opportunity desirous the Petitioner.

Consequently, the Petitioner has regressed in her career, and has suffered personal injury.

Subsequent the "Management Initiated-adverse actions", and the Respondent agency's denial the Petitioner "restoration" her original grade GS-07, Petitioner has lost four within-grades, an annual lost of approximately \$2700.00 since 1983, a total loss that exceeds \$15,000.00 in lost wages and earnings; a loss the Petitioner is entitled restored.



The Petitioner contends the Respondent agency's actions have been arbitrary, capricious, an abuse of discretion; not in accordance with law; obtained without procedures required by law, rule or regulations having been followed and unsupported by substantial evidence.

The Petitioner believes the U.S. Court of Appeals was wrong when it affirmed the Claims Court dismissal of her claims complaint in that the Petitioner filed a timely appeal pursuant to FCR 15(c)(1)(ii) and (iii), which states "within 14 days after the date of docketing of a petition for review", the Petitioner informed the Court, "any claim of discrimination by reason of race, sex, age, national origin, or handicapped condition raised before the Court has been abandoned and will not be raised or continued in this or any other Court". The Petitioner was seeking review of the Court's dismissal of her case for "lack of jurisdiction, and failure to state a claim for relief".

Additionally, Petitioner believes the Appeals Court should have determined whether the Respondent agency, breached the cognizable "Settlement Agreement", since the Petitioner had complained of "Management Initiated-adverse actions, against the Petitioner,

through "no fault" of the Petitioner;  
Hanson v. Dept. of the Army, 90-3327,  
October 4, 1990.

The Petitioner properly exhausted all administrative remedies to no avail. The Petitioner believes she is entitled equitable relief and the right to be made whole.

#### REASONS FOR GRANTING THE WRIT

Pursuant to SCR 20.2 and .3.(a), the Petitioner believes her Petition for a Writ of Certiorari should be granted in that the Petitioner believes the Court of Appeals, Federal Circuit's ORDER, denying the Petitioner's Petition for Rehearing that was timely filed pursuant to FCR 40 and pro se R. 13. Since the Petitioner had already abandoned any issues that had been raised concerning possible discrimination by reason of race, sex, age, national origin, or handicapped condition raised in Claims Court or any Court, pursuable under Title VII, Section 717 of the Civil Rights Act of 1964. The Petitioner seeks relief for a "breach of Settlement Agreement", which is the Petitioner's understanding, a "contract", just as any other "contract", a matter governed by principals of federal common law. However, the District Court, the Fifth Circuit Court

Court of Appeals, the Claims Court, and the Court of Appeals Federal Circuit, has clearly, not spoken to the breach of the "Settlement Agreement", in the Petitioner's case.

The Petitioner had entered a "Settlement Agreement", (contract) which had been "breached"; since the Petitioner was involuntarily reassigned without a choice in the decision. Her right were violated. Thus, the Petitioner's March 16, 1985 request to reinstate her 1981 complaint, the basis of the 1982 "Settlement Agreement" which was denied by Respondent agency, the Equal Employment Opportunity Commission; the Petitioner was therefore, denied "due process" of law.

On October 7, 1991, the Petitioner filed an addendum to her Petition for Rehearing, initially filed by express mail October 6, 1991, following the Petitioner's receipt of the U.S. Court of Appeals Federal Circuit's Judgment without an Opinion, Notice of Entry of Judgment without Opinion, Information Sheet, entitled "Filing A Petition For A Writ Of Certiorari", concurrently, October 5, stamp dated October 3, 1991.

In Petitioner's October 7, 1991, addendum, Petition for Rehearing, the Petitioner cited

what she believes to be the Federal Circuit's precedent ruling on "Agreements"; which stated:

"An agreement that settles a personnel dispute between a federal employee and his or her agency is a contract, and it is within a law judge's power to interpret that contract if another disagreement arises, Federal Circuit; Hanson v. Dept. of the Army, 90-3327, October 4, 1990".

The Petitioner's Petition for Rehearing \*\*  
was denied November 4, 1991, as forestated in the Petitioner's Jurisdictional statement.

The Petitioner believes she has suffered a "miscarriage of justice", as forestated in her jurisdictional statement.

The Petitioner sincerely believes that Section 1981 of Title 42 and the U.S. Constitutional Amendment Five, commands this Honorable Court to review her case, and grant the Petitioner relief or remand her case to the proper Court for relief.

#### CONCLUSION

For the reasons stated herein, Petitioner believes a Writ Of Certiorari should be issued to the Court of Appeals Federal Circuit, to review its Judgment herein.

Respectfully submitted,

*Warene D. Alford*

WARENE D. ALFORD

Petitioner, Pro Se

2002 Cedar Valley Ln.

Dallas, Texas 75232

(214) 339-9444 Home

(817) 334-3811 Work

This 4th day of December 1991.

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**\*\*Note:** the Petitioner cited the law, but failed to cite the statute itself 5 U.S.C.S. 7703; for judicial review, in her Petition for Rehearing.

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## A P P E N D I X

APPENDIX A

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

No. 91-5093

WARENE D. ALFORD,  
Plaintiff-Alleppant,  
v.  
UNITED STATES, et al.,  
Defendant-Appealees.

ORDER

Before NIES, Chief Judge, RICH, Circuit Judge, and LOURIE, Circuit Judge.

A petition for rehearing having been filed in this case, UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is denied.

Dated: November 4, 1991

cc: WARENE D. ALFORD  
KATHERYN A. BLEECKER

ALFORD V, US, 91-5093  
(CLM - 90-995 C)

FOR THE COURT

/s/

Francis X. Gindhart  
Clerk

FILED

U.S. COURT OF APPEALS FOR  
THE FEDERAL CIRCUIT  
NOV 4 1991

FRANCIS X. GINDHART  
CLERK

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\*Note: pursuant to Fed. Cir.  
R. 47.8, this order is not citable as  
precedent. It is a public record.

Note: pursuant to Fed. Cir. R. 47.8  
this disposition is not citable as  
precedent. It is a public record.  
The disposition will appear in tables  
published periodically.

APPENDIX B

UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

91-5093  
WARENE D. ALFORD,  
Plaintiff-Appellant,  
v.  
THE UNITED STATES,  
Defendant-Appellee.

JUDGMENT

ON APPEAL from the UNITED STATES  
CLAIMS COURT in CASE(S) 90-995C.

This CAUSE having been considered, it is  
ORDERED and ADJUGED:

Per Curiam (NIES, Chief Judge, RICH AND LOURIE  
Circuit Judges):

AFFIRMED. See Fed. Cir. R. 36.

DATED: SEP 12 1991  
stamp dated



FILED  
U.S. COURT OF APPEALS FOR  
THE FEDERAL CIRCUIT  
SEP 12 1991  
FRANCIS X. GINDHART  
CLERK

ENTERED BY ORDER OF THE COURT

/s/

---

Francis X. Gindhart, Clerk

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\*\*Note: JUDGMENT, Notice of Entry of Filing A Petition For Writ Of Certiorari, and JUDGMENT Issued as Mandate, stamp dated October 3, 1991, were received concurrently, October 5, 1991.

APPENDIX C

IN THE UNITED STATES CLAIMS COURT

\* \* \* \* \*

WARENE D. ALFORD, \*

Plaintiff \*

v. \* No. 90-995C

UNITED STATES OF AMERICA, \* Filed: Apr 29 1991

Defendant.. \*

\* \* \* \* \*

ORDER

Plaintiff's Motion for Reconsideration  
is DENIED, for the reasons given in the  
Opinion filed on April 10, 1991.

/s/

ROBERT H. HODGES, JR.  
Judge

IN THE UNITED STATES CLAIMS COURT

FILED: APR 11 1991

No. 90-995C

WARENE D. ALFORD

v.

JUDGMENT

THE UNITED STATES

Pursuant to the opinion of April 10, 1991, directing dismissal of the complaint pursuant to RUSCC 12(b)(1),

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed. Each party will bear its own costs.

Roger L. Nieman  
Acting  
Clerk of court

By: a signature  
Deputy Clerk

April 11, 1991

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Note: As to appeal, 60 days from this date, see RUSCC 72, re number of copies and listing of all plaintiffs. Filing fee is 105.00.

This opinion/order will not be published in the United States Claims Court Reporter because it does not add significantly to the body of law and is not widespread interest.

IN THE UNITED STATES CLAIMS COURT

No. 90-995C

(Filed: April 10, 1991)

\*\*\*\*\*

WARENE D. ALFORD, \*  
Plaintiff, \*  
v. \*

UNITED STATES OF AMERICA, \*  
Defendant. \*

\*\*\*\*\*

Warene D. Alford, Dallas, Texas. pro se.  
Katheryn A. Bleecker, Dept. of Justice  
Washington, D.C., for the defendant.

OPINION

HODGES, Judge.

This case is before the court on defendant's motion to dismiss for lack of subject matter jurisdiction pursuant to RUSCC 12(b)(1), and for failure to state a claim pursuant to RUSCC 12(b)(4). Plaintiff seeks to recover damages arising from an alleged breach of a settlement agreement resolving her Title VII racial discrimination claims. The court

finds that it lacks jurisdiction over Plaintiff complaint.

On October 30, 1981, Plaintiff filed an Equal Employment Opportunity complaint against the Dept. of the Army Corps of Engrs., Fort Worth District. After an investigation, it was determined that Plaintiff demonstrated a prima facie case of discrimination. The complaint was settled December 19, 1982.

As part of the settlement agreement, plaintiff was reassigned. This job was later reclassified, and plaintiff was offered another. She initially refused but finally accepted the new position. Approximately one month later, she filed another Equal Employment Opportunity complaint with the Dept. of the Army alleging that her transfer was the result of discrimination and retribution for her earlier claim. Her new claim was determined to be without merit by the U.S. Army Civilian Appellate Review Agency. The case was appealed to the Equal Employment Opportunity Commission. It also found that the claim was without merit.

Plaintiff then filed two suits in the United States District Court for the Northern District of Texas. The cases were consolidated and tried on June 20, 1988. Her claims before the district court were substantially the same as the claims before this court.

The district court dismissed the case pursuant to Fed. R. Civ. P. 41(b). Plaintiff appealed to the Court of Appeals for the Fifth Circuit. The court of appeals found that the district court erred in finding that plaintiff failed to establish a prima facie case of discrimination regarding several instances of her non-selection and remanded the case. On remand, the district court found no discrimination and entered judgment for the government. The decision was not appealed.

#### DISCUSSION

Plaintiff seeks damages for a breach of a settlement agreement, misapplication of regulation, personal injury, fraud and denial of due process. She states that this court has jurisdiction pursuant to 28 U.S.C.S. 1491, 2501, (1988) and the Fifth and Fourteenth Amendments of the Constitution. Plaintiff's claims are based on 5 U.S.C.S. 2302(b)(11) (1988); 5 U.S.C.S. 2302(a)(2) (1988); 5 U.S.C.S. 5362 (1988); and 42 U.S.C.S. 2000e-16(a)(e) (1988).

28 U.S.C.S. 1491 (1988) is the Tucker Act. It permits claims against the United States "founded either upon the Constitution, or any act of Congress or any regulation of an executive department, or

upon any express or implied contract not sounding tort".

The Tucker Act does not create a substantive right for money damages. United States v. Testan, 424 U.S. 392, 398 (1976). Plaintiff's right to recover must be founded either upon the Constitution, a federal statute, or a regulation, which grants plaintiff, expressly or by implication, a right to be paid a sum certain. Eastport S.S. Corp. v. United States, 178 Ct. Cl. 599, 605, 372 F.2d 1002, 1007 (1967). 28 U.S.C.S. 2501 (1988) establishes a six year statute of limitations for cases brought in Claims Court.

The Fifth and Fourteenth Amendments to the Constitution do not give this court jurisdiction in this fact situation. While Plaintiff does not clarify the grounds for reliance upon the Fourteenth Amendment, presumably she is arguing that she has been denied equal protection under the law.

The Fourteenth Amendment applies to state action. The federal government has been held to the same standards through the due process clause of the Fifth Amendment. See Rolling v. Sharpe, 347 U.S. 497 (1954). However, the words of the

equal protection clause do not create a cause of action for money damages, Muehelen v. UNITED States, 209 Ct. Cl. 690, 529 F.2d 533 (1976) (citing Eastport S.S. Corp. v. United States, 178 Ct. Cl. 599, 372 F.2d 1002 (1967)). The due process clause of the Fifth Amendment does not apply to this Title VII action in this Court.

Plaintiff's claims are related to an alleged breach of her 1982 Title VII settlement agreement. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.S. 2000e. et seq. (1988), is the "comprehensive, exclusive, and preemptive remedy for federal employees alleging discrimination". Fausto v. United States, 16 CL. CT. 750, 753 (1989) (citing Brown v. General Ser. Admin., 425 U.S. 820, 829, (1976). Federal district courts have exclusive jurisdiction over Title VII actions. 42 U.S.C.S. 2000e-5(f) (3) (1988).

Plaintiff requested that her complaint be transferred to a federal district court upon a finding of lack of jurisdiction by this court. The court must transfer a case to any court in which the action could have been brought at the time it was filed, if it is in the interest of justice. 28 U.S. C.S. 1631 (1988). However, this case has been litigated in the United States District



Court for the Northern District of Texas and appealed to the Court of Appeals for the Fifth Circuit. Its transfer would not service justice.

#### CONCLUSION

The United States Claims Court does not have subject matter jurisdiction to hear this case. The Clerk is directed to dismiss plaintiff's complaint pursuant to RUSCC 12(b)(1). Each party will bear its own costs.

---

**\*\*Note: the plaintiff "finally accepted the new position"; "under protest".**

APPENDIX D

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAD DIVISION

WARENE D. ALFORD,

Plaintiff,

v.

SECRETARY JOHN O. MARSH,  
DEPARTMENT OF THE ARMY,  
et al.,  
Defendants.

CA-86-2499-G

c/w

CA-87-2304-F

EXCEPRTS  
BENCH RULING

THE COURT:

"Of course the issue in this case is not whether Thornborough or any related employees were better qualified. The Railroad is entitled to make that decision for itself. The Age and Discrimination Employment Act was not intended to be a vehicle for judicial second guessing or business decisions nor was it intended to transform the court into personnel managers.

I say that because I want to emphasize to Ms. Alford that I may not necessarily agree with adverse

personnel decisions that were made in this record that relates to her nor would I necessarily would have made that same decision myself but the Federal Courts are not and indeed do not have the resources to be a super personnel manager that second guesses every decision that is made so even though I might think that the defendant's personnel decisions relating to Ms. Alford were unwise or unfair or unjust, as long as they did not treat her different because she had engaged in a protective activity under Title VII, then it is not within my purview to give her relief".

June 20, 1988.

/s/

A. JOE FISH  
U.S. District Judge

---

\*The above mentioned Excerpt is a part of Respondent's Appendix, page 57 and 58 (opposition to Prtitioner's Claims complaint).

\*\*After second hearing, the Honorable A. Joe Fish, reemphasized the aforementioned statement in his second "Bench Ruling". Additionally, he stated, since the Appellant had so vigorously pursued her complaint, it was his opinion that Appellant might be entitle money damages.

That was when the Appellant decided to file a complaint for compensation.

APPENDIX E

Re: OSC File No. 10-5-00408

OFFICE OF SPECIAL COUNSEL  
U.S. MERIT SYSTEMS PROTECTION BOARD  
1120 Vermont Avenue N.W.  
Suite 11  
Washington, D.C. 20005

EXCERPT

"We do not petition the Merit System Protection Board for a Stay of every action alleged to be a prohibited personnel practice....."

"We carefully reviewed the information you provided to us, and made preliminary inquiries, but found no evidence that a prohibited personnel practice has been committed....."

Sincerely,

/s/

---

\*Note: Complainant's Petition was acknowledged received by the Special Counsel in their letter to complainant dated January 24, 1985.

The complainant's Stay request was denied by phone, February 5, 1985, followed by a letter dated March 7, 1985.

The complainant accepted her present position "unsdr protest", per advise, the Office of Special Counsel, Washington, D.C

APPENDIX F

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
OFFICE OF REVIEW AND APPEALS

2401 E Street, N.W.  
Washington, D.C. 20507

Re: Alford, Warene D.

Date: Received 5/28/85

Agency No.: 04-82-015-E

Docket No.: 01.85.1762

Excerpt

ANALYSIS AND FINDINGS

"While the Commission has published no regulations concerning the precise procedures to be followed when a complainant requests reopening his/her complaint, what we have required in the past is essentially the procedure the agency followed. The agency must investigate the complainant's allegations in order to determine whether it has failed to carry out or has rescinded any of the provisions of the settlement agreement..."

Based upon a review of the record, and for the reasons stated above, the final decision of the agency is affirmed".

FOR THE COMMISSION:

Sep 2 1986

DATE

/s/

Dolores L. Rozzi, Director  
Office of Review and Appeals

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**\*\*Note :** In Robles v. Panama Canal Commission, U.S Dist. Court for D.C., #84-3635, The EEOC wrote: "Under EFOC regulation 29 C.F.R.S. 1613.217, if an agency does not carry out, or resinds, any action specified by the terms of an adjustment, reinstate the complaint for further processing from the point processing ceased under the terms of the adjustment".

The EEOC further wrote: "The Commission has deemed by virture of our regulations that the proper course to be followed when such disagreements arise over settlement agreements is to rescind same and continue processing the complaint".

In the Petitioner's case, the EEOC issued a decision contrary to its established regulation 1613.217. Hence, subsequent its injection of an improper policy in Petitioner's request of March 16, 1985, to reinstate her 1981 complaint which was the basis of the Petitioner's 1982 "Settlement Agreement", The Petitioner was denied "due Process" of law.

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD  
DALLAS REGIONAL OFFICE

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Warene D. Alford,	*
Appellant,	* Docket No.
v.	* DA07528610045
Department of the Army,	* Date:
Agency.	* Jan. 21, 1986

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Before

Hugh S. Parker, Presiding Official

EXCERPT

DECISION

"Because the record fails to show a matter appealable to the Board, the appeal is dismissed".

FOR THE BOARD:

/s/

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HUGH S. PARKER  
Presiding Official

APPENDIX H

UNITED STATES  
Office of  
Personnel Management  
Southwest Region  
1100 Commerce Street  
Dallas, Texas 75242  
Aug 19 1985

Ms. Warene D. Alford  
2002 Cedar Valley  
Dallas, Texas 75232

Dear Ms. Alford:

We contacted the civilian personnel office at the Corps of Engineers in Fort Worth to obtain information concerning the issues raised in your letter of July 29, 1985. Based on the circumstances described, we have no basis for conducting an investigation, as you have requested.

It is our understanding that your position of Civil Engineering Technician, GS-802-06, was reclassified to Procurement Clerk, GS-1106-05, due to a realignment of the Military Branch to which you were assigned. You were subsequently reassigned to a vacant position as Civil Engineering Technician, GS-802-06. A reassignment of this nature does not constitute a violation of civil service regulations and provides no basis for review or investigation by this office.

If you consider that any actions have been taken that are in violation of the agency's merit promotion plan, you may wish to file a grievance under the agency



procedure that is applicable to you.

Sincerely,

/s/

Joseph P. Werr

Assistant Chief, Agency

Compliance and evaluation Division

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\*Note the Petitioner had already attempted to file a grievance under the agency's procedure prior to making an appeal to the Office of Personnel Management to no avail. (See petitioner's claims complaint page 18) The Petitioner's grievance was "rejected in accordance with AR-690-771.4-2b.

However, the petitioner had not filed a complaint at that time. In fact, the February 8, 1985 D.F/letter, was the petitioner's grievance.

The petitioner did not file her second complaint until April 3, 1985, as reflected in the Respondent's Motion to Dismiss, second paragraph, page four, filed December 13, 1990, responding to Petitioner's Claim complaint for "Compensation and Restoration".

\*\*Additionally, the Petitioner was reassigned from an Civil Engineering Technician position, with "contract related", administrative duties, to an Engineering Technician position, with drafting related duties, depriving the petitioner the opportunity to continue gain hands-on-experience, to bridge the "career ladder" to a professional occupation, specifically, Contract Specialist.